United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

2-7-75

74-2336

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

CBS INC.,

Plaintiff-Appellant,

against

P/S

STOKELY-VAN CAMP, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

CRAVATH, SWAINE & MOORE,
Attorneys for Plaintiff-Appellant,
One Chase Manhattan Plaza,
New York, N. Y. 10005

HAROLD R. MEDINA, JR.,
RICHARD M. HIRSCH,
Of Counsel.

3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 74-2336

CBS INC.,

Plaintiff-Appellant,

v.

STOKELY-VAN CAMP, INC.,

Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Statement

Stokely's brief has three themes, each of which may be disregarded, *i.e.*,

(1) Lennen was not Stokely's advertising agency —it did everything on its own.

(2) Case law supports Stokely's position, citing three cases which supposedly negate authority, one case for the proposition that Lennen was an independent contractor and one case on estoppel.

(3) CBS had a *duty*—based on what is never explained—to report to Stokely and not to consent to delay of payment by Lennen.

We submit that (1) is factually inaccurate, (2) is irrelevant and (3) is legally wrong.

(1) The Purported Stokely-Lennen Agency "Arrangement"

On June 26, 1973, W. Marcus Newberry, Vice President and Director of Marketing for Stokely, testified at a deposition. He initially testified as follows (87a-88a):

> "Q. What was the relationship between Stokely-Van Camp and Lennen & Newell? A. Lennen & Newell was our advertising agency.
>
> "Q. How long had that continued? A. They were the agency of Stokely-Van Camp, the canned food division, for a period of 17 years.
>
> "Q. Was there any written agreement with respect to that agency arrangement? A. Not to my knowledge, there was not.
>
> "Q. Were there any changes in the relationship during that 17 years? A. In what respect?
>
> "Q. As to the basis on which Lennen & Newell was acting as your agent. A. A change in personnel, organizational structure and that would be the basic change that was made.
>
> "When I joined—after joining the company, Stokely-Van Camp in 1962, we changed our company from a produce and sell to a marketing concept and the agency subsequently changed to match that.
>
> "I had a supervisor and accounting executive that handled the different brands."

Thereafter, Newberry testified as follows (93a):

> "Q. Now, can you identify Plaintiffs' Exhibit 3 for identification* as having been sent by Mr. Stokely to Lennen and Newell on or about December 8, 1971? A. Yes.

---

*Exhibit 3 on the deposition is Exhibit QQ on the summary judgment motion, Stokely's letter to Lennen regarding General Electric Broadcasting, Inc. dated December 8, 1971.

> "Q. Prior to that date, had there been any other communications of any nature between Stokely-Van Camp and Lennen & Newell with respect to the basis on which Lennen & Newell was contracting for television time? A. Not to my knowledge."

Despite that testimony, Newberry on April 1, 1974, nine months later, presented an affidavit in opposition to plaintiff's motion for summary judgment which stated as follows (23a):

> "Stokely's arrangement with L&N was for L&N to purchase media space or broadcast time on L&N's sole responsibility and credit, and not upon Stokely's credit or in its name. . . ."

Obviously, Newberry was merely stating his understanding of the "arrangement", an understanding that had never been discussed with Lennen so that his "understanding" of the arrangement could not possibly be binding on Lennen, or on CBS. It was not until December 8, 1971, that Stokely finally communicated with Lennen (Ex. QQ) concerning the basis on which Lennen was contracting for television time, protesting with respect to a communication received from General Electric Broadcasting, Inc. and stating that Stokely was not liable therefor. All that Stokely had done previously was to hire Lennen as "our advertising agency" (87a) in 1956 with the necessary implications of the term "agency". If Stokely's understanding of the "arrangement" had previously been communicated to Lennen, there was no necessity for the letter of December 8, 1971. Indeed, the letter explicitly states that it was written because "we want it on record" (Ex. QQ). Lennen falsely replied in its letter of December 16, 1971 (31a-33a). Lennen's letter of December 16 (31a) was plainly false, particularly in the statements (32a) "that these creditors

have agreed that the responsibility to them is totally the Agency's" and (33a) "our creditors accept that responsibility to them is ours alone and is in no way to be shared".

Lennen's reply was false both because it knew the specific basis on which it had contracted with CBS and because CBS on March 13, 1971 had written to Lennen (Ex. PP) with respect to the Florida Citrus Commission and stated as follows:

> " 'As you know, our basic contractual arrangement is with the advertiser, and we deal with advertising agencies as legal agents of these sponsors. The practice of being paid through the agency has developed over the years as a convenience to the sponsor and a service provided by the agency, but it does not alter our basic contract with the sponsor directly.' "

Irrespective of the falsity of Lennen's communication, the vital point is that this was the sole communication between Lennen and Stokely concerning the basis on which Lennen was contracting with the media other than Stokely's oral act of hiring Lennen as "our advertising agency". By December 8, 1971, Stokely's liability had long since become firm because of action taken by "our advertising agency." Stokely could not save itself by attempting, after the fact, to change its "arrangement" with Lennen. The Newberry affidavit of April 1, 1974, may thus be completely disregarded in its pertinency to this action and this appeal.

It is perfectly obvious that Lennen was "engaged in doing for his master what he has been directed to do", *Rolfe* v. *Hewitt*, 227 N. Y. 486, 491 (1920), so that there is actual authority. There was also apparent authority as set forth in the Restatement of the Law of Agency, Second, which states in Comment a to § 27:

> ". . . Third persons who are aware of what a continuously employed agent has done are normally entitled to believe that he will continue to have such authority for at least a limited period in the future, and this apparent authority continues until the third person has been notified or learns facts which should lead him to believe that the agent is no longer authorized."

For further discussion of this obvious point we refer the Court to Point I of our main brief (pp. 5-25).

(2) The Five Purported Relevant Cases

In its brief, Stokely relies on the *North American Van Lines* decision (pp. 19-21), the *U. S. Media* decision (pp. 21-3) and the *Goozh* decision (pp. 23-4) as establishing a purported lack of authority. Stokely's brief also relies on the *Farrell Lines* decision (pp. 30-2) to establish Lennen as an independent contractor and the *Hearst* decision (pp. 38-9) to establish estoppel. We do not disagree with the legal concepts enunciated in *North American Van Lines, Goozh, Farrell* or *Hearst.* The facts of each, however, do not fit this case. While some of the facts in the *U. S. Media* fit this case, the legal concepts employed by Judge Ryan in the bankruptcy court are totally erroneous and that case is now on appeal before the Southern District of New York awaiting decision by Judge Owen.

(a) North American Van Lines

The appendix to Stokely's brief gives Judge Mansfield's opinion. However, it omits from that opinion the copy of the ABC contract involved in that case, a copy of which is attached to the copy of the opinion which we have received. A copy of that contract is annexed hereto as Appendix A (we apologize for the quality of the copy

but it is the best we can get). From that contract, it appears that the contractual arrangement made by ABC, far from being explicit as to agency as are the CBS-Lennen contracts ("as agent for" Stokely), was ambiguous. The contract is headed "ABC RADIO NETWORK FACILITIES CONTRACT". Under that heading there is one box labelled "ADVERTISER" and another box labelled "AGENCY" in which the name of the advertiser and the agency, respectively, appear without designation of status. Thereafter, and just above the signature lines, appears the following statement:

> "AGREEMENT made between AMERICAN BROADCASTING COMPANY, a division of AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.", designated herein as 'Company', and the above named advertising agency, designated herein as 'Agency', to broadcast announcements in ABC programs on behalf of the above named advertiser, designated herein as 'Advertiser' ".

Patently, the contract itself did not specify whether the agency was acting for itself or for the advertiser and, with that ambiguity, the entire line of proof to which Judge Mansfield made reference, and on which he denied summary judgment, would be admissible. But no such proof is admissible here for the contracts between CBS and Lennen are clear and unambiguous. Lennen was explicitly "acting as agent for" Stokely.

(b) *U. S. Media*

In this case the advertisers had not paid the agency, U. S. Media, and the question involved was whether the advertisers should pay U. S. Media, a bankrupt, or pay CBS. There were two initial questions of jurisdiction, *i.e.*, whether the bankruptcy court had jurisdiction to rule on

the claims of U. S. Media against the advertisers and whether the bankruptcy court had jurisdiction to enjoin CBS from proceeding against its advertisers. On the merits, actual authority by way of communication as between the advertisers and the media was proved and was corroborated by the testimony of the former President and former Treasurer of U. S. Media, so that the case does not parallel the present action in which there was no communication between CBS and Stokely. Despite that proof, Judge Ryan held that U. S. Media owned the accounts payable by the advertisers since U. S. Media had fraudulently listed those accounts as its own on its books, *directly contrary to the written contracts between CBS and U. S. Media.* To our mind, Judge Ryan's decision constitutes a very plain case of "legalized larceny"—and that is the ground on which the appeal now rests with Judge Owen in the Southern District. Judge Ryan patently desired to get some assets into the bankruptcy and the only way he could do so was by taking the money from CBS. Judge Ryan merely signed all findings submitted by the bankrupt, many of which had no support in the record.

With respect to authority, the following testimony (there is much more) is illustrative of the status of the *U. S. Media* case:

(1) U. S. Media's principal witness, Norman King (founder and former President of the corporation), testified as follows:

"Q. What would you do with that time after you purchased it?

"A. We did nothing with it, because *we didn't purchase it for ourselves.*

"Q. Did you sell the time thereafter.

"A. We buy time; we don't—*we didn't sell time.*" May 2, 1972, transcript at p. 7.

(2) James Cannon (the former Treasurer of U. S. Media), testified as follows:

"Q. Can you tell me whether the general procedure was for U. S. Media to obtain a written authorization from either the advertiser or its advertising agency to purchase commercial radio and television time for a particular product?

"A. Yes.

". . . .

"Q. Was it the general practice to get letters of authorization?

"A. Yes, it was the general practice.

"Q. If you didn't get written authorization, you had oral authorizations?

"A. Yes.

"Q. Did you not?

"A. *Somebody had to authorize us to purchase the time.*

"Q. Now, after you obtained the authorizations from either the advertisers or their advertising agencies, *you then contacted the radio or television stations for what purpose?*

"A. *To place media schedules.*

"Q. *On behalf of the*——

"A. *The advertiser.*" May 2, 1972, transcript at pp. 106-08.

(c) *Goozh*

Stokely's reliance on *Goozh* is illustrative of its lack of understanding of the posture of Lennen and CBS. In the *Goozh* case the advertising agency's method of operation was to purchase available media time on its own account and broker it among various advertisers, the agency having

testified that it was solely responsible for the cost of such advertising. The agency performed no other services for advertisers and received no compensation other than the commissions allowed by the media. In fact, there was proof that the station had on previous occasions sued advertising agencies directly for amounts due on the broadcast of commercials. The method of doing business recited in the *Goozh* decision is directly contrary to the policies and practices followed by CBS. All dealings by CBS with Lennen were with respect to a known sponsor whose products were to be advertised and, far from the *Goozh* concept of broadcasting time, the purpose of such dealings was to prepare a package best suited to the advertising needs of the client who had authorized Lennen to spend sums for the advertisement of its products. The facts of *Goozh* thus are not consistent with the facts here so that the decision has no application whatsoever. Indeed, in the *Hearst* case, also relied on by Stokely, the Court not only found authority based on a factual situation as to contractual arrangements similar to that existing here (Appellee's Appendix 56a) but also distinguished *Goozh* as we have noted above (Appellee's Appendix 58a-59a).

(d) *Farrell Lines*

If CBS, without having received payment from Lennen, had falsely given receipted bills showing payment to Lennen, and Stokely, on the basis of those receipted bills, had paid Lennen then we certainly agree that *Farrell Lines* might here apply. But in *Farrell Lines,* the forwarder (equivalent to Lennen) apparently contracted with the carrier (equivalent to CBS) as principal and not, as here, explicitly "acting as agent for" the shipper (equivalent to Stokely). Moreover, in that case the carrier (CBS) stamped "Freight Prepaid" on the bills of lading and accepted the

forwarder's (Lennen) Outward Freight Bills in payment. The shipper (Stokely) paid the forwarder (Lennen) only after receiving the bills of lading stamped "Freight Prepaid". Under those circumstances the carrier (CBS) had clearly accepted the credit of the forwarder (Lennen) in lieu of the credit of the shipper (Stokely) and could no longer look to the shipper (Stokely) for payment. The same is true of the other cases cited by Stokely in its brief (p. 32).

In our case, Stokely took no steps whatsoever to insure that Lennen paid CBS (Newberry dep. 95a), CBS made it crystal clear to Lennen that it looked to Stokely for payment (Ex. PP) and Lennen by Speirs assured CBS that it had informed Stokely of the Lennen financial position (Werle dep. 151a, 153a; Schrager dep. 163a; Rauchenberger dep. 124a). Speirs, in his affidavit, does not deny those conversations.

(e) *Hearst*

If Lennen, at the time of the two network contracts of April 1971 and the 13 station contracts of December 1970—September 1971 had been "hopelessly insolvent" and "hopelessly in default" and CBS had knowledge of those facts, we quite agree that *Hearst* might apply. But no such factual situation is here presented as we have set forth *in extenso* in Point II of our main brief (pp. 25-47). Indeed, the precautions exercised by CBS with respect to Lennen's financial posture were designed to insure that Stokely and CBS were protected from a *Hearst* situation arising (main brief fn. p. 27). Yet Stokely now seizes upon those precautions as allegedly releasing it from liability.

In *Hearst,* it is noteworthy that there were two contracts involved. A first series of contracts were entered into on March 21, 1963, and prior thereto, and involved

$6,999.75. The second contract was entered into on March 3, 1964 for $18,729.75. Although the agency was in default in payments on March 21, 1963 and prior thereto, the Court allowed recovery of the money involved in those contracts and only barred Hearst from recovery on the contract of March 3, 1964, at which time the agency was "hopelessly insolvent" (Appellee's Appendix 59a) and "hopelessly in default" (Appellee's Appendix 60a).

We submit that none of the Stokely case law is pertinent to this action.

(3) The Purported CBS Duty

Stokely relies on the CBS failure to notify it and the CBS consent to delay in payment. Those two facts are the basic theme of Stokely's brief, running through the Statement of Facts (pp. 2, 3, 4, 8, 9, 10, 11, 12, 13), Point I on authority (pp. 25, 27), Point II on independent contractor (pp. 28, 29) and Point III on estoppel (pp. 33, 36, 37, 38, 40). Those facts are relevant, according to Stokely, because CBS had a duty to notify Stokely of any delay in payment and to insist on prompt payment. We submit that, legally, no such duty exists, especially on the facts of this case where Stokely put itself completely in the hands of Lennen and Lennen lied to both Stokely and CBS and perpetrated a fraud on Stokely. Let us examine some typical principle-agent-contractor situations.

Payment for the printing of this brief, for instance, is the obligation of CBS since Cravath told the printer to print the brief for CBS. But should the failure of the printer to notify CBS of delay in payment and the printer's consent to delay of payment by Cravath be at the risk of not being paid by CBS? CBS is entitled to a receipted bill, if it desires, before it pays Cravath for the printing

charges. CBS trusts Cravath and does not ask for the receipted bill or communicate with the printer to verify payment—but that failure to act cannot lessen the CBS obligation to pay the printer should CBS pay Cravath and Cravath fail to pay the printer. If the printer did contact CBS it would be with knowledge of future diminution of work from Cravath. Has the printer that duty when CBS has put Cravath in that position and paid the bill without asking for proof of payment by Cravath to the printer? The essence of the situation is that CBS trusts its agent and will take the risk that Cravath has not paid the printer. But, having deliberately taken that risk and lost, CBS must still pay the printer if Cravath has not paid and cannot claim estoppel by reason of the printer's failure to notify or consent to delay in payment by Cravath. On this basis, Stokely also owes the money for the Lord, Day & Lord brief on its behalf. We presume Stokely did not ask Lord, Day & Lord for a receipted bill —but a failure to request that receipted bill and a payment by Stokely to Lord, Day & Lord does not cancel the Stokely obligation to the printer if Lord, Day & Lord did not make the payment. Stokely took that risk when it trusted Lord, Day & Lord.

In every day life as another example, Mr. Perkins requests Mrs. Perkins to have his shoes repaired. Mrs. Perkins goes to the shoemaker and tells him that Mr. Perkins wants his shoes repaired. At what point does the shoemaker have a *duty* to by-pass Mrs. Perkins and contact Mr. Perkins for payment? And if the shoemaker does not contact Mr. Perkins and consents to delay of payment by Mrs. Perkins, does he lose his right to payment by Mr. Perkins? Patently, the consent to delay and failure to notify Mr. Perkins cannot cancel Mr. Perkins' obligation to pay for the work. Nor can the fact that Mr. Perkins has given

Mrs. Perkins the money to pay for the work lessen that obligation. Nor does the fact that there is $4 rather than $400,000 involved.

In short, the *duty* on which Stokely relies just does not exist. We repeat our main brief. Lennen was Stokely's agent and Stokely had the duty of checking that which its agent did. It had the duty to ask for a receipted bill prior to payment or to make a call to CBS to verify before payment. Having failed to do so, it cannot foist on CBS the fraud of Stokely's agent, Lennen. That is our very simple point.

The caution which Stokely could have exercised is shown vividly by the action of the Florida Citrus Commission which, presumably because it did not receive receipted bills, arranged to pay CBS direct. But Stokely preferred to trust its agent, Lennen. It took the risk and cannot complain if it lost.

The District Court, in its finding that CBS had a duty, was patently influenced by the fact that it had previously found that Lennen had no authority, either express or implied. But once authority is found, as we believe it clearly should be, the duty disappears, if it ever existed.

There is nothing in the CBS knowledge or actions which can change the logical conclusion to be drawn from this lack of duty. Facts in that regard are set forth *in extenso* in Points II and III of our main brief (pp. 25-50). As Stokely asserts in its brief (pp. 40-41), it had "one limited responsibility—to pay for its advertising". But that is payment to CBS, not to Lennen. Clearly, Stokely has not lived up to its responsibility, since CBS has not been paid. All that Stokely had to do was either to pay against receipted bills or communicate with CBS. It did neither. Yet it had the duty so to act if it was to satisfy its responsibility.

Conclusion

For the foregoing reasons, the judgment below should be reversed and vacated and judgment should be directed in favor of CBS as demanded, with costs in favor of CBS.

February 10, 1975.

Respectfully submitted,

CRAVATH, SWAINE & MOORE,
Attorneys for Plaintiff-Appellant,
One Chase Manhattan Plaza,
New York, N. Y. 10005.

HAROLD R. MEDINA, JR.,
RICHARD M. HIRSCH,
Of Counsel.

Appendix A

A1

RECEIVED 1/21/65

AMERICAN BROADCASTING COMPANY
A Division Of American Broadcasting-Paramount Theatres, Inc.
New York, New York

3. CONTRACT NO. 10[illegible]
4. CONTRACT DATE 1/5/65

ABC RADIO NETWORK FACILITIES CONTRACT
(Program Furnished by ABC)

ADVERTISER
[illegible]th American Van Lines
P. O. Box 988
Fort Wayne 11, Indiana

6. AGENCY
E. H. Russell, McCloskey & Co.
200 East Ontario Street
Chicago, Ill.
Charlotte Tucker

PROGRAM(S)
[illegible]x Dreier M-F
[illegible]x Dreier "Man on the Go" Sat.

8. PRODUCT(S) AND/OR SERVICE(S) AUTHORIZED TO BE ADVERTISED.
Moving Services

9. BROADCAST START	10. DAY(S) OF WEEK	11. CANCELLATION CYCLE DATES		
[illegible]/65	Mon-Sat	Firm		
ACCOUNT EXECUTIVE	**13. CONTRACT TERM**	**14. NO. WEEKS**	**15. RATE CARD NO.**	**16. NO. OF ADD'L. P.**
[illegible]ara	1/5/65-1/1/66	52	9	1

ADDITIONAL INSTRUCTIONS OR REMARKS

[illegible]x Dreier 6:30-6:40 PM MST M-F 1/4 sponsorship on 2 one week-3 the next week basis
[illegible]rting Tue 1/5/65.
[illegible]x Dreier "Man on the Go" 6:30-6:40 PM MST Sat. ½ sponsorship starting Sat. 1/9/65.

[illegible] attached sheet for exact schedule.

[illegible]firmed lineups will follow.

AGREEMENT made between AMERICAN BROADCASTING COMPANY, a division of AMERICAN BROADCASTING-PARAMOUNT THEATRES, Inc., designated herein as "Company", and the above named advertising agency, designated herein as "Agency", to broadcast announcements in ABC programs on behalf of the above named advertiser, designated herein as "Advertiser." The provisions contained on the reverse side hereof and in the pages attached hereto are part of this contract.

E. H. Russell, McCloskey & Company
Agency

By [signature]

AMERICAN BROADCASTING COMPANY
A Division Of American Broadcasting-Paramount Theatres, Inc.

By [signature]

Company will cause the program(s) specified herein to be broadcast on the day(s) and approximate time(s) specified herein. If any station(s) listed herein is not available, Company will not be liable except to the extent of adjusting the time charge as per clearance guarantee, if any. Such unavailability shall not constitute a breach of this agreement or vest in Agency any right to terminate this agreement or recover damages. Company and licensees of stations specified herein will not be liable respecting audience mail addressed to it or them for forwarding or for use or benefit of Agency or Advertiser.

2. INTERRUPTIONS AND APPROPRIATIONS:

A. The failure of Company to broadcast all or part of any program over one, more, or all of the stations hereunder due to force majeure including an Act of God, Federal, State or Municipal law, governmental regulation or order, defect or breakdown of lines or equipment, a labor dispute, or for any cause beyond the control of Company, shall not constitute a breach of this contract by Company or vest in Agency any right to terminate this agreement or to recover damages and, in such instances, the time charges only will be proportionately reduced. Company will be under no liability for failure of broadcast by a bonus station.

B. Company reserves the right to preempt the program time for broadcasting, on either a sustaining or a sponsored basis, a special program or an event or program deemed by Company to be of public importance. In such event, Company shall make such courtesy announcements, if any, as Company may deem appropriate. Company shall endeavor to give as much advance notice as possible of any such preemption.

C. If, pursuant to subparagraph A or B above, all of the program is omitted over all of the stations hereunder, Company will cancel all charges hereunder for the omitted broadcast, or if all of the program is omitted over one or more but less than all of the stations hereunder, Company will reduce the time charges only, proportionately, in accordance with clearance guarantee, if any. Omission of time pursuant to subparagraphs A or B above, shall not affect adversely rates of discount and/or rebate allowances and/or contiguous rates.

D. If, pursuant to paragraph 2 herein, all of the program is omitted over all of the stations hereunder, Company may reschedule the omitted announcements subject to agency approval. If agency does not so approve the rescheduling, charges will be cancelled as specified in subparagraph 2A or 2C.

3. PROGRAM AND COMMERCIAL MATERIAL:

A. Except for Advertiser's commercial announcements and billboards, or as otherwise provided for herein, Company shall furnish the program(s) hereunder ready for broadcast during the approximate time period(s) ordered hereunder. Company reserves the right, from time to time, to change the point of origination and/or the method of origination of the program(s) and/or commercial announcements and billboards.

B. Agency shall furnish at its expense all of Advertiser's commercial announcements and billboards in accordance with the technical and delivery requirements applicable to the program(s). Company may designate the methods by which commercial announcements and billboards will be integrated into a program. Social security, union payments, and employer tax obligations as to talent employed by Agency or material furnished by Agency hereinunder shall as between Agency and Company be assumed by Agency.

C. At least forty-eight (48) hours (Exclusive of Saturdays, Sundays and legal holidays) before the starting hour of any program, Agency must deliver to Company the commercial announcements and billboards of Advertiser. Advertiser's commercial announcements and billboards must conform to Company's program and operating policies and are subject to approval by Company's Continuity Acceptance Department. Company shall have the continuing right to require Agency to edit and modify such commercial announcements and billboards or to require Agency to furnish substitute material satisfactory to Company, to the extent Company deems necessary to make same conform to the public interest and to Company's program and operating policies. If Agency fails to furnish material as herein provided, or if Company determines any such material furnished and Agency fails to edit and modify such material or to furnish a satisfactory substitute or if time does not permit such editing or substitution, Company shall have the right, without prejudice to any of its other rights hereunder, to furnish new or modified material or to furnish promotional or public service announcements in place of Agency's material without identification of Advertiser except as Company may deem appropriate, and to broadcast same, and Agency agrees to pay Company the entire cost therefor. No such action by Company under this subparagraph shall relieve Agency of its obligation to make payments for all charges provided for under this contract.

4. RATE PROTECTION:

Company's Radio Network Rate Card specified in Box 15 is the rate card in effect as of the date hereof or, if a new rate card has been announced publicly prior to the date hereof and will become effective on or before Advertiser's first scheduled broadcast date hereunder, then it is the rate card in effect as of Advertiser's first scheduled broadcast date hereunder. If Company publicly announces an amendment to a rate card or an issuance of a new rate card at any time after the date hereof and if the terms of such amendment or new rate card shall be more advantageous to Advertiser, then Advertiser shall have the right, as of the effective date of such amendment or new rate card, to adopt such amendment or to change to such new rate card as to programs broadcast after such effective date. If the rates and charges under such amendment or new rate card shall not be more advantageous to Advertiser, then the rates and charges under such amendment or new rate card shall not apply to Advertiser until six (6) months after the date upon which such amendment or new rate card is announced publicly.

5. BILLING AND AGENCY COMMISSION:

Broadcast charges shall be payable by Agency on or before the fifteenth (15th) day of the month following that of broadcast. If this contract is with a recognized advertising agency, an agency commission of fifteen percent (15%) will be allowed on gross billings, less applicable rebates and discounts. Payments hereunder shall be in lawful money of the United States and date of payment is material. Agency agrees not to rebate to Advertiser any agency commission allowed to Agency hereunder, and will refund to Company any unearned commission paid to it.

6. PRODUCTS, SERVICES AND PRODUCT PROTECTION:

A. The product(s) and/or service(s) of Advertiser which Agency is authorized to advertise on the program(s) hereunder are specified in Box 8. Unless waived in writing by Company, only the product(s) and/or service(s) specified in Box 8 shall be advertised by Agency in the broadcasts hereunder.

7. INDEMNIFICATION:

Company agrees to indemnify, hold harmless and defend Agency and/or Advertiser, and their respective officers, directors, agents, stockholders and employees from and against any and all claims, suits, damages, liabilities, costs and expenses including reasonable counsel fees arising from the broadcast or preparation therefor or contemplated broadcasting of material furnished by Company. Agency agrees to similarly to indemnify, hold harmless and defend Company, American Broadcasting-Paramount Theatres, Inc., any licensee of any station ordered by Agency hereunder, and their respective officers, directors, agents, stockholders and employees from and against any and all claims, suits, damages, liabilities, cost and expenses including reasonable counsel fees arising from the broadcasting or preparation therefor or contemplated broadcasting of material furnished by Agency. Exercise by Company of any of its rights pursuant to Paragraph 3 hereof shall have no effect on any of Agency's obligations pursuant to this paragraph. It is understood that the indemnitor (party hereto on whom duty of indemnification is imposed hereunder) will be notified as soon as reasonably possible of the commencement of any litigation, and the indemnitee, upon request, will furnish indemnitor with all relevant facts in its possession or under its control and will cooperate fully with the indemnitor. The provisions of this paragraph shall survive the expiration, termination or cancellation of this contract for any reason.

8. GENERAL PROVISIONS:

This contract is made subject to all applicable federal, state and municipal laws and regulations now or hereafter in force and shall be construed according to the laws of the State of New York. Any assignment of this contract without the consent of Company shall be void. The terms of this contract constitute the entire understanding between the parties hereto with respect to the subject matter hereof and shall supersede all prior agreements between the parties with respect thereto. Waiver of any provision hereof in any instance will not constitute a general waiver of any right hereunder. This instrument is not binding on Company until duly executed on behalf of Company.

(Continued)

NETWORK FACILITIES CONTRACT
ADDITIONAL CLAUSES

PROGRAM TITLE
Alex Dreier M-F & Alex Dreier "Man on the Go"

TITLE
North American Van Lines

AGENCY
E. H. Russell, McCloskey & Company

9. The total cost for time and program per broadcast will be:
Weekday - $1200.60 (Time $950.60 - Program $250.00)
Saturday - $1200.00 (Time $900.00 - Program $300.00)
All above costs subject to 15% Agency Commission.

10. It is understood and agreed that Company will furnish a minimum weekly clearance of 90% on the Weekday Alex Dreier Program and 90% on the Saturday Alex Dreier Program of the total value of the full Network. In the event the weekly clearances fall below the above mentioned guarantees by a full percentage point, Company will allow a credit on the net time charges, less 15% Agency Commission as outlined in Paragraph 9 hereunder. Credits to be computed by multiplying said net time charges by the percentage figure obtained by deducting the percentage of actual clearances from said gurarantees. Clearances in excess of said guarantees will be at no additional cost to Advertiser.

11. It is understood and agreed that Company will not schedule on the Network within the ten minute period immediately preceding and following Advertiser's commercial announcements the advertising of any product(s) competitive with Advertiser's authorized to be advertised hereunder.

12. It is understood and agreed that Advertiser's commercial time will consist of one minute plus a fifteen second opening or closing billboard per program. It is further understood that Advertiser will rotate between the first and second half of the Weekday 6:30 - 6:40 PM Alex Dreier Program.

13. It is understood and agreed that any and all merchandising and promotion plans utilizing ABC Radio personalities and/or programs; must have the prior written approval of the ABC Radio Network, such approval not to be unreasonably withheld.

14. It is understood and agreed that this contract is firm and non-cancellable.

Approved for ABC by

Approved for Agency by